companies, and low power television stations. To suggest that common ownership of two television stations in the same market poses any meaningful threat to competition in this market defies the record evidence, sound economic analysis, and common sense.

In this competitive environment, the current duopoly rule is an anachronism. Permitting common ownership of two stations in the same market (or their joint operation under an LMA), as urged by LSOC, involves no risk of harm to competition or the public interest. Record evidence demonstrates conclusively that every relevant market is competitive and would remain so. It shows in an equally compelling fashion that diversity in every sense of the word is expanding and would remain more than adequate to satisfy the most demanding standard.

At the same time, the potential benefits to competition and the public interest would be significant. Again, the record evidence is substantial and irrefutable. The Commission need only look to substantial evidence developed from the operation of stations pursuant to LMAs -- evidence which demonstrate the efficiencies inherent in the combined operation of two stations and the service improvements engendered by these efficiencies. The LMA experience confirms that common ownership of two stations in the same market is highly beneficial. Marginal stations have achieved economic and competitive viability and along with their sister-stations have been able to offer improved public service to consumers. Failed stations have been rescued and revitalized. In many instances, millions of dollars in new capital has been infused into the operation of LMAd stations, thereby facilitating improvements in their technical facilities and programming. Stations which had been broadcasting home shopping and "triple runs," now are furnishing local newscasts, professional sports events, children's programming, and local public affairs programming.

Permitting common ownership of two stations in the same market would permit even more widespread gains in broadcast service. The vigor and vitality of marginal stations would be renewed, and failing stations would be rescued from the brink. Vacant channels could be used to provide an entirely new service. Furthermore, commonly-owned local television stations would become stronger competitors for programming, advertising, and viewing! They would be more effective competitors to new and entrenched multichannel video providers, such as DBS and cable television, respectively. Thus, the record demonstrates that the costs of relaxing the duopoly rule would be nil, while the benefits would be real and substantial. Therefore, the only rational course open to the Commission is a significant step forward and away from the current strict prohibition on common ownership of two stations in the same market

Initially, the Commission ought adopt a singular market definition -- the DMA. Use of predicted coverage contours should be abandoned. The DMA is the market definition of the industry. It also has been employed widely by the

Commission for purposes of other rules. Furthermore, use of contours typically has invited arbitrary results, placing the Commission in the awkward position of finding the overlap inconsequential when two stations clearly compete in different DMAs. The Commission, therefore, should adopt the DMA as the primary market definition for purposes of the duopoly rule. However, where two stations with no Grade A contour overlap are located in the same DMA, they, nevertheless, should not be considered as serving the same market.

Moreover, in view of Congressional intent and dramatic increases in competition in every relevant market, the Commission must open the door to ownership of two television stations in a market where one of the stations is a UHF station via an outright exception to the current duopoly rule.[9] First, UHF stations remain at a disadvantage *vis-a-vis* VHF stations. Until the Commission determines how to change the immutable laws of physics, the propagation characteristics of UHF television transmission will remain inferior to those of VHF television transmission. Thus, UHF stations continue to suffer a coverage disadvantage. Their audiences are smaller. Their revenues are smaller. Despite widespread cable

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[9]LSOC's proposal in no way would leave the Commission blind or helpless in the face of a proposed merger of local stations which demonstrably would impose competition and diversity costs which clearly outweigh the well-established benefits of common ownership. All proposed assignments or transfers of station licenses would remain subject to Commission review, and those involving new duopolies still could be found contrary to the public interest in the face of *bona fide* and compelling showings of harm.

coverage, they continue to compete at a decided disadvantage. This disadvantage will not disappear in the emerging world of digital broadcast television.

Second, no combination involving a UHF station would threaten competition or diversity in markets thriving with more competition than ever.

Third, an exception to the rule would be simple, straightforward, and predictable. Stations would know the rules. Markets would not be plagued by uncertainty -- one of the most difficult problems faced by any business, particularly those seeking financing from lenders or investors. Moreover, the delay inherent in processing waiver requests -- also a critical problem in fashioning sound business arrangements -- would be avoided.

Fourth, the benefits of common ownership are well-established. No need exists to re-examine them in case-by-case waiver proceedings. The Commission and stations, therefore, should not be confronted with the burdens of preparing, prosecuting, and processing waiver requests.

In the case of proposed combinations of two VHF stations, the Commission, as directed by Congress, should adopt a policy under which waivers would be granted only in unusual or compelling circumstances. This reflects not only Congressional intent, but also the inherently stronger position of VHF stations, especially in intermixed markets.

Whereas LSOC contends that the Commission should adopt an outright exception to the duopoly rule for combinations involving at least one UHF station, LSOC does wish to address the waiver criteria proposed by the Commission. LSOC posits that the Commission should employ waiver criteria which are rational and relate directly to public interest concerns appropriate for review by the Commission. First, any "minimum voice" test should encompass all media voices. Looking only to video or broadcast voices ignores the ability of radio, print, and nonbroadcast video media in conveying their owner/editor's viewpoint to the public. Second, neither market size nor market share ought play a role in any waiver analysis. Market size or rank *per se* is a meaningless criterion, particularly if the Commission also employs a minimum voice test. As to market share in some relevant product market, Commission's analysis likely would be redundant. The Department of Justice or the Federal Trade Commission is the proper agency for merger review, and such reviews focus heavily on market shares.

Third, a failed station test would be too restrictive. The failure or near failure of a station is no prerequisite to the benefits of common ownership. Furthermore, requiring that stations hover on the brink of collapse would leave the public with inferior service and place creditors at undue risk. Therefore, whereas waivers should be granted readily in the case of failing stations, they hardly should be limited to failing stations.

Finally, the Commission must adopt policies which recognize the well-established benefits of LMAs. Congress intended that the FCC grandfather existing LMAs and allow them in the future based on Congress's appreciation of the benefits of LMAs. LSOC urges the Commission to grandfather LMAs in effect on November 4, 1996, and permit them to continue into the future even beyond the current term of the LMA and even if the station is transferred or assigned. The benefits of LMAs are well-established and hardly will vanish at the expiration of the current term of a contract or the sale of the station. Similarly, the highly competitive nature of all relevant markets assures that neither competition nor diversity is threatened in any material way by LMAs. To sunset LMAs, rather than truly grandfather them also places at risk substantial sums of money invested in LMAs which were lawful at the time, tantamount to a taking without compensation.

If the Commission decides to consider LMAs attributable interests and maintain the duopoly rule without material relaxation, the Commission should create an exception for LMAs -- including LMAs entered into after November 4, 1996.[10] Again, Congress intended the Commission to allow LMAs in the future, and, again, the benefits are demonstrable, while the costs are nil.

The past 25 years have witnessed dramatic changes. The new video marketplace no longer is monolithic. Local broadcast stations now compete directly

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[10]Of course, if the Commission were to permit common ownership of two stations in the same market or decide that LMAs were not attributable interests, LSOC's request would be largely moot.

with these numerous new video media. They compete for viewers. They compete for advertising. They compete for programming. Consequently, rules designed for the bygone era of the broadcast marketplace must give way to rules which permit broadcasting to continue to thrive and serve the public in the increasingly competitive video marketplace of the next millennium.

To that end, LSOC has advanced the above-summarized position embodying meaningful relaxation of the Commission's duopoly rule. In support of LSOC's position, the following is shown:

II. Maintaining the Current Strict Prohibition on Common Ownership of Two Television Stations in the Same Market Would Contravene Congressional Intent.

Congress has directed the Commission to review the duopoly rule.[11] This was no idle gesture. Congress saw a very different world in 1996 than existed in 1964, when the duopoly rule in its present form was adopted, and knew that something had to be done. Whereas it may have left the fine tuning of a revised duopoly rule to the Commission, it hardly envisioned or intended that the Commission would

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[11]Section 202(C)(2) of the 1996 Act provides as follows:

> (2) Local ownership limitations. The Commission shall conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market.

thrash the issue about for a bit and then do nothing! Senator Ford spoke eloquently to the point on the Senate floor:

> Mr. President, in addition to reforms of the local and long distance telephone companies, this conference report includes a number of overdue revisions to the laws regulating the broadcasters. I believe that these changes are necessary to respond to the changing competitive nature of the broadcast industry, in the same manner as the changes this conference report foresees for the telephone industry. One of the changes in this legislation includes directions to the Federal Communications Commission to conduct a rule-making on the so-called duopoly rule.
>
> The duopoly rule was last revised by the FCC in 1964. And it prevents the ownership of more than one television station in a local market. This regulation served a useful purpose by ensuring there would be competition and a diversitv of media voices in a television market.
>
> However, in the last 32 years, the local media have gained so many new competitors that I have begun to question whether the duopoly rule still promotes good policy. That is why I endorse the provisions of the conference report which direct the FCC to conduct a rule-making to determine whether to retain, modify, or eliminate this rule.
>
> Today, consumers have access to many more broadcast stations than a generation ago, let alone, a decade ago. More significantly, consumers today have access to a host of non-broadcast station video providers, all of which offer dozens or even hundreds of channels. Competition to broadcasters is coming from the cable industry, wireless cable systems, satellite systems, and video dialtone networks. With such competition, I believe that we may have reached the point where the viability of free over-the-air programming, provided by single-channel broadcasters, may be threatened by the new multi-channel competitors.
>
> Too many local broadcasters, particularly in smaller markets, are already losing money. This is a concern to me, and should be a concern to other Members, because I believe that local television broadcasters are just as important as local radio stations and local newspapers. Together, these local broadcasters help to develop a sense of community through the coverage of local events. It is my hope that

> the FCC will examine this matter thoroughly and revise the duopoly rule appropriately.[12]

In like vein, the House of Representatives Committee on Commerce in reporting the House version of the bill stated:

> The Committee believes that significant changes in local video markets, which include increases in the number of local television stations and other multichannel competitors, require substantial deregulation of the local television ownership rules. This is especially true with respect to UHF stations which continue to operate with significant technical and economic handicaps. The Committee believes that these market developments require substantial deregulation of local station ownership and greater reliance on marketplace forces to assure vigorous competition and diversity. Permitting common ownership of stations will promote the public interest by harnessing operating efficiencies of commonly owned facilities, thereby increasing competition and diversity.[13]

Furthermore, Congress was telling the Commission to do something it already was doing. Such a directive would have been meaningless unless Congress intended the Commission to do something.

While the House bill spelled out particular revisions to the duopoly rule, the Senate bill included no similar provision. The provision ultimately adopted in the conference deferred the matter to the Commission, but still showed an expectation that relaxation of the rule for UHF-UHF and UHF-VHF combinations was in order. So great was that expectation that the conference committee stated its intention that the provision not be a vehicle for relaxation of the rule to allow VHF-VHF combinations:

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[12] 142 CONG. REC. S 687, S705 (daily ed. Feb. 1, 1996).

[13] H. Rep. 104-204, 104th Cong. 1st Sess. (1995) at 119-120.

> Subsection (c)(2) directs the Commission to conduct a rulemaking proceeding to determine whether its rules restricting ownership of more than one television station in a local market should be retained, modified or eliminated. It is the intention of conferees that, if the Commission revises the multiple ownership rules, it shall permit VHF-VHF combinations only in compelling circumstances.[14]

A colloquy between Senator Inouye, ranking member of the Senate Subcommittee on Communications, and Senator Hollings, ranking member of the Senate Committee on Commerce, further reveals the expectation that the duopoly rule would be modified:

> Mr. INOUYE. I'd appreciate my colleague's help in clarifying the conference report's effect on the Hawaiian television market. No one needs a geography lesson to learn that my state is located in the middle of the Pacific Ocean. As such, interference with adjacent television markets is not a concern and, unlike every other market in the United States, every VHF channel is utilized somewhere in Hawaii's market.
>
> I'd ask of the gentleman, when the FCC considers the duopoly rule, does he agree that the FCC should strongly consider that Hawaii's unique situation represents an example of compelling circumstances that could permit the combination between two VHF stations in that market?
>
> Mr. HOLLINGS. The gentleman from Hawaii is correct. His state's local television market developed differently from continental markets because of its unique geography and terrain, and thus is characterized by many VHF stations. Many of our concerns about combinations involving two VHF stations in local markets in the continental United States do not apply to Hawaii. The FCC should recognize this distinction when considering the duopoly rule.
>
> Mr. INOUYE. I thank my colleague for his clarifications and for his expertise and leadership on this historic revision of our telecommunications law.[15]

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[14]Conference Report at 163.

[15]142 CONG. REC. S 687, S705-706 (daily ed. Feb. 1, 1996).

Such report language and floor discussion would have been pointless in the absence of an expectation that the Commission would modify the duopoly rule in a meaningful way, particularly for combinations involving UHF stations.

A colloquy between Chairman Fields of the House Subcommittee on Telecommunications and Finance and Representative Stearns lends further proof that something meaningful is expected from the Commission. As reflected in the Congressional Record:

> The following is the understanding and agreement referred to in the colloquy between Representative Fields and Representative Stearns:
>
> The conference report directs the FCC to conduct a rulemaking proceeding to determine whether to retain, modify or eliminate its duopoly rule, which prevents ownership of more than one television station in a market. Since the rule was last revised, the local media marketplace has undergone a breathtaking transformation. This has been characterized not only by a large increase in the number of broadcast stations (up one-third in the last decade alone), but more significantly by an onslaught of new multichannel rivals to traditional broadcasters, such as cable and satellite systems, and soon, video dialtone networks.
>
> It is agreed that, when it considers revision of the duopoly rule pursuant to this conference report, the FCC should give serious weight to the impact of these changes in the local television marketplace-changes which have left broadcasters as single-channel outlets in a multi-channel marketplace.
>
> It is also our intent that the FCC should revise the rule as is necessary to ensure that broadcasters are able to compete fairly with other media providers while ensuring that the public receives information from a diversity of media voices.
>
> It is also agreed that the FCC should consider granting waivers for combinations in which at least one station is a UHF and where the FCC determines that joint ownership, operation, or control will not harm competition or the preservation of a diversity of voices in the local television market.

As our numerous hearings demonstrated, today's local television marketplace exemplifies the massive changes in the competitive landscape that we've witnessed in many sectors of communications. Viewers are no longer limited to a few TV channels. Rather, consumers have-or soon will have-access to dozens of cable channels, wireless cable, satellite and video dialtone systems.

Broadcasters compete with these multi-channel rivals for viewers and ad dollars alike. In particular, interconnected and clustered cable systems are now capable of offering advertisers local spots throughout an entire local media market, thus directly impacting the local broadcasting market. Indeed, cable's share of local advertising revenues increased by 80% between 1990 and 1993, and this rate of increase is projected to continue for the foreseeable future.

If we want free, over-the-air programming to survive and thrive, we need to give broadcasters the flexibility they need to compete effectively with their new multi-channel rivals.

* * * *

In 1964, the FCC last revisited the duopoly rule which prohibits an entity for owning two television stations in a local market. In 1964, there were very few VHF stations and the FCC felt this rule was necessary to ensure diversity. Well, the video landscape has changed dramatically since the implementation of the 1964 duopoly rule.

Americans have access to many over-the-air broadcast channels. In the last decade alone, the number of commercial broadcast stations has increased by nearly one-third. This increase in free over-the-air viewing options, coupled with the availability of a multitude of video outlets-cable, wireless cable, DBS and the imminent entry of telephone companies offering video dialtone-evidences the fact that the duopoly rule has outlived its usefulness.

Serving local needs in an expensive endeavor. Relaxing the duopoly rule would allow station owners to achieve economies of scale by sharing equipment, accounting, and other common station costs. Saving on broadcasting costs would enable broadcasters to compete with themselves as well as other nonbroadcasting competitors. Keeping the duopoly rule freezes broadcasters as single channel providers who must compete with other multichannel providers.

Broadcasters have long found cable to be a formidable rival for viewers, but now local broadcasters are losing market share for local advertising revenues, too. For years, because of fragmentation of ownership in local markets, cables' share of local ad revenues has

> lagged behind its rapidly increasing penetration and viewership. But increasingly, cable operators are creating marketwide interconnects capable of offering local spots on all the cable systems in a market. Moreover, in order to compete with phone companies, cable operators are clustering at a rapid pace so that they dominate an entire local market. Driven by these interconnects and clustering, cable's share of local advertising revenues increase 80 percent from 1990 to 1993.
>
> Because of the increased competition from fellow stations and other video providers, many broadcaster stations are marginal operations, particularly in the smaller markets, where, according to the FCC, stations lost on average $ 880,000 in 1991. Adding a further financial complication, the conversion to digital broadcasting will be stressful for these smaller market stations.
>
> In this increasingly competitive communications market, it is not fair if one competitor remains leashed to outdated regulations. This is what will happen if we do not relax the duopoly rule, while we unshackle many of the broadcasters' competitors.[16]

Again, Congress saw a need for deregulation, rather than a blind embrace of a rule which has outlived its usefulness in today's thriving and competitive video marketplace.

Therefore, the Commission must act -- and act promptly and decisively. Congress expressed its intention that the Commission do no less.

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[16]142 CONG. REC. H1145, H1163-1164 (daily ed. Feb. 1, 1996).

III. Maintaining a Strict Prohibition on Common Ownership of Two Television Stations in the Same Market Would Be Arbitrary and Capricious in the New Video Marketplace.

Nearly 60 years ago, the Commission adopted what amounted to a "more is better" policy with respect to the number of separately owned stations in a market.[17] Nearly 60 years ago -- or even 30 years ago, when the current version of the television duopoly rule was adopted --, that policy may have made sense.[18] The rules assured that the three local affiliates which defined the viewing options in most markets (as well as any independent stations attempting to gain a foothold in the market) remained not only "competitors," but also distinct media voices. Each station had to be under separate ownership and control. No station could be owned by a local daily newspaper. No station could own a local cable system or radio station. It also maintained rules designed to insulate local stations -- and emerging independent stations in particular -- from anticompetitive practices by the three networks. Networks also were prohibited from owning cable television systems or even acquiring a financial interest in or syndicating a program shown on the network. Networks could provide only three hours of programming to their affiliates in the top 50 markets in the four hours of prime time each evening.

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[17] *Genesee Radio Corp.*, 5 FCC 183 (1938).

[18] *Report and Order*, 45 FCC 1476 (1964); *but see* Haring, John, and Shooshan, Harry M., *A Numerator in Search of a Denominator*, Strategic Policy Research (May 17, 1995) at 1 [hereinafter cited as "Haring-Shooshan"], submitted with the Comments of Fox Television Stations, Inc., MM Docket No. 91-221 (filed May 17, 1995), suggesting the rules *never* have made any sense.

Realizing that the only source of competition and diversity in the video marketplace was local television stations (in their own rights and as conduits for their networks), the Commission sought to extract and preserve as much competition and diversity as possible among the broadcast stations in each local market.

That was then. This is now. Local television stations today compete voraciously for viewers, advertising, and programming with video media which barely existed in 1972.[19] The evolution of the broadcast television marketplace to a multi-media video marketplace hardly may be blinked. Competition exists where it never did before. Diversity has grown by leaps and bounds. In this new market context, the combination of two local stations no longer poses any material threat to competition or diversity.[20] Furthermore, this new and expanding competition have

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[19]According to the Commission, local television stations "operate in three economic markets relevant to the rules under consideration: the market for delivered video programming, the advertising market, and the video program production market." *Further Notice*, 10 FCC Rcd at ¶22.

[20]As pointed out by the Commission staff as this decade began:

> Many of the FCC's broadcasting rules were adopted when there were far fewer channels per market and the three networks dominated the supply of programming. Much of the FCC's broadcast regulation was motivated by a desire to limit economic power and concentration of control over program content on the part of broadcast stations and networks. These concerns appear misplaced, or at best, of greatly diminished importance, in a world where broadcast stations and networks face dozens of cable channels and program networks.

F. Setzer and J. Levy, *Broadcast Television in a Multichannel Marketplace*, FCC Office of Plans and Policy, Working Paper No. 26, 6 FCC Rcd 3996, 4004 (1991)[hereinafter cited as "OPP Report"].

affected adversely local television stations' ability to "contribute to a diverse and competitive video programming marketplace.[21]

A. The Local Advertising Market Is Highly Competitive and Hardly Would Be Imperiled by Relaxation of the Duopoly Rule.

The singularly critical market in any analysis of competition involving local broadcast television stations is the local advertising market. As LSOC has pointed out previously, the local advertising market is the market that clearly drives the station's competitive behavior because advertising revenue is the nearly exclusive source of revenue for local television stations.[22]

1. The relevant market for local advertising reasonably includes cable television, broadcast radio, local newspapers, and other nonelectronic media.

Any analysis of competition and the effects of various contemplated actions thereon necessarily begins with a definition of the relevant product market.[23] LSOC submits that the relevant local advertising product market should include at least

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[21] *Further Notice,* 10 FCC Rcd at ¶6, *citing* OPP Report.

[22] Comments of The Local Station Ownership Coalition, MM Docket No. 91-221 (filed May 17, 1995) at 16 [hereinafter cited as "LSOC Comments"].

[23] Inasmuch as the duopoly rule is a constraint on local ownership, the use of the local (as opposed to national) market as the relevant geographic market for advertising is virtually beyond controversy. The precise geographic boundary is a pertinent issue. In that respect LSOC concurs with the Commission that the Nielsen Designated Market Area or DMA is the proper determinant of the local market for purposes of the duopoly rule and competition analysis in this proceeding. *See* Section V, *infra*.

broadcast and cable television, broadcast radio, print advertising, and other non-electronic media. The Commission tentatively has agreed that broadcast television, cable television, radio, and newspapers comprise the relevant market.[24] The record leaves no doubt that the Commission's conclusion is sound and , if anything, under inclusive. Indeed, several of the most searching and substantial economic studies submitted in this proceeding have concluded that the relevant product market for local advertising clearly includes radio, cable, and print media, *and likely includes other media as well.* One such study observes, for example, that

> [T]here is sufficient information from a variety of sources upon which to conclude that the product dimension of relevant markets for local advertising messages may well encompass all media -- including both electronic media, *e.g.*, radio, broadcast, and cable television, and nonelectronic media, *e.g.*, direct mail, newspapers, magazines, yellow pages and billboards."[25]

This conclusion rested on several substantial premises, as follows:

- Sellers of print and electronic media advertising consider themselves in competition with each other, as evidenced by their efforts to sell against each other in the local market -- and

[24] *Further Notice* at ¶43.

[25] Addanki, Beutel, and Kitt, *Regulating Television Station Acquisitions: An Economic Assessment of the Duopoly Rule*, National Economic Research Associates (May 17, 1995) at 2 [hereinafter cited as "NERA (LSOC)"], submitted as Exhibit 1 to the LSOC Comments; *see also* Kitt and Beutel, *An Economic Analysis of the Relevant Advertising Market[s] Within Which to Assess the Likely Competitive Effects of the Proposed Time Brokerage Arrangement Between WUAB Channel 43 and WOIO Channel 19* National Economic Research Associates (July 15, 1994) at 2 [hereinafter cited as "NERA(Malrite)"], submitted as Exhibit 5 to the Comments of Malrite Communications Group, Inc., MM Docket No. 91-221 (filed May 17, 1995)[hereinafter cited as "Malrite Comments"].

their respective trade associations' efforts to help them promote themselves against competing media.[26]

- Buyers of advertising also use a variety of media and are or would be responsive to relative price changes.[27]
- Academic literature has recognized that various advertising media compete for advertising dollars.[28]
- While expenditures on broadcast television have increased, television has become less expensive relative to newspapers, thus, indicating that lowering advertising rates may affect advertisers' selection of media -- and that various media are substitutes for each other.[29]

The other major economic study submitted to the Commission concludes similarly that

> The empirical evidence ... indicates that other forms of advertising, such as yellow pages, outdoor, and direct mail, are substitutes for video, radio, and newspaper advertising.[30]

The study observes that

> At both the national and local levels, advertisers generally use an array of media. . . . Advertisers that use broadcast television typically make use of other media as well. Also, over time there have been substantial shifts in advertising among media, for example, from print to television, and within television from network to syndicated and cable,

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[26]NERA (LSOC) at 11-12; NERA (Malrite) at 7-8.

[27]NERA (Malrite) at 8-11.

[28]NERA (Malrite) at 11-14; NERA (LSOC) at 12-13.

[29]NERA (LSOC) at 15.

[30]*An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-ownership Rules*, Economists Incorporated (May 17, 1995) at 23 [hereinafter cited as "The EI Study"].

> in response to changes in the relative prices and efficacy of these media.[31]

It concludes further that

> [T]here is no evidence to support a conclusion that other forms of advertising -- including yellow pages, outdoor, and direct mail -- do not constrain the prices of video, radio, and newspaper advertising. In sum, advertising markets are likely to be broader than those tentatively identified by the Commission.[32]

These conclusions are confirmed by the actual behavior of various competing advertising media in the Cleveland market, which compete directly with each other for local advertising dollars.[33] For example, the *Cleveland Plain Dealer* has published advertisements that explicitly target television advertisers.[34] The Yellow Pages Publishers Association also provides member firms with "profiles of the competitive strengths, weaknesses and competitive trends in television, radio, direct mail, magazines, outdoor, and newspapers.[35] Comments of other broadcasters echo this reality. For example, Cedar Rapids Television Company asserts that

> Advertisers frequently use mixtures of radio, television, direct mail, cable, telemarketing (a major industry in Cedar Rapids), and other media services to reach their customers. These mixtures constantly change to reflect the unique marketing demands of each advertising campaign. Media entities compete fiercely for their "share" of these advertising dollars, attempting to persuade advertisers that their

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[31] EI Study at 19.

[32] EI Study at 24.

[33] NERA (Malrite) at 7-8.

[34] NERA (Malrite) at 7.

[35] NERA (Malrite) at 7.

respective media are the most effective in terms of customer response and efficiency.[36]

Coming from the licensee of a television station and radio station which is a subsidiary of the publisher of a local newspaper, such a statement is entitled to considerable weight. Clear Channel Television states similarly that

> [T]elevision broadcasters do not only compete with all other video providers. Broadcast television stations sell only their advertising time. As such, they compete with all other providers of advertising time, such as newspapers, billboards, magazines and direct mail....[37]

In short, economic analysis and real world experience provide substantial evidence that the local advertising market is even more broadly defined than the Commission believes it to be.

Furthermore, the record reveals that cable television is becoming a larger and more effective competitor to broadcast television every day.[38] Three developments contribute to cable's growing effectiveness as a competitor to broadcast television. First, cable's share of the viewing audience continues to increase. As the Commission recently found

> Over the past decade, the number of television viewing hours of non-premium cable networks has grown. Comparing the 1984-85 and 1994-

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[36]Comments of Cedar Rapids Television Company, MM Docket No. 91-221 (filed May 17, 1996) at 4 [hereinafter cited as "Comments of Cedar Rapids Television Company"].

[37]Comments, MM Docket No, 91-221 (filed may 17, 1995, by Clear Channel Television Licenses, Inc.) at 2.

[38]*See, e.g.*, Comments to Further Notice of Proposed Rule Making by the Association of Independent Television Stations, Inc., MM Docket No. 91-221 (filed May 17, 1995) at 13 [hereinafter cited as "INTV Comments"].

> 95 seasons, the combined, full-day audience of cable networks increased from an 11% share to a 30% share of television viewing hours. . . .This growth in the viewership of the cable networks has continued into the 1996/1997 season. The total prime time share of the cable networks in the first week of the 1996/1997 season increased 11.1% over the first week of the 1995/1996 season to 30% of viewing hours.[39]

Second, as already noted by LSOC and others, cable operators are forming market-wide advertising "interconnects" which eliminate much of the inefficiency inherent in having to purchase advertising via separate transactions with multiple cable operators in a market.[40] Third, cable operators are "clustering" their systems to permit a single operator to dominate a local market. Like interconnects, clustering eliminates inefficiencies in the purchase of cable advertising.[41]

By taking advantage of larger audience shares and greater efficiencies from interconnects and clustering, cable has shown and likely will continue to show double digit growth in advertising revenues.[42] Thus, between 1994 and 1995, cable

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[39] *Third Annual Report*, CS Docket No. 96-133, FCC 96-496 (released January 2, 1997) at 12 [hereinafter cited as *Third Annual Report*].

[40] LSOC Comments at 9-10; INTV Comments at 11; Comments of Ellis Communications, Inc., MM Docket No. 91-221 (filed May 17, 1995) at 5 [hereinafter cited as "Ellis Comments"].

[41] LSOC Comments at 9; INTV Comments at 11-12; Ellis Comments at 5.

[42] For example, Jones Intercable reportedly has clustered numerous systems in the Washington, D.C. DMA. Systems forming the cluster include Alexandria, Prince George's County, Prince William County, Calvert County, Charles County, and Ann Arundel County.

MSO revenue from advertising increased by 18.9%.[43] Double-digit growth is expected to continue through 1999. Veronis, Suhler & Associates points out that

> [S]pot and local cable advertising continue to have high growth potential. We expect local and spot advertising to grow at a 12.8 percent compound annual rate over the next five years, representing only a slight moderation compared with the 15.7 percent annual growth of the last five years. Spot and local advertising will nearly double over the forecast period, rising from $685 million in 1994 to $1.3 billion by 1999.[44]

Finally, as noted by Kitt and Beutel:

> The fact that cable systems derive the overwhelming majority of their revenues from subscription fees affords them the ability to price advertising slots on an incremental basis. This suggests that the competitive pressure that cable exerts on local advertising rates may be understated by its current share of advertising revenue.[45]

Cable, thus, will become an even more effective competitor for local advertising revenue each year.

The Commission, therefore, must conclude that local stations sell advertising in a market inhabited by numerous competitors, including not only radio, cable television, and local newspapers, but also other non-electronic media (*e.g.*, direct mail, Yellow Pages, etc.).

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[43]*Third Annual Report* at 14. Between 1980 and 1990, cable advertising increased from only $53 million to nearly $1.8 billion -- more than a thirty-fold increase. *Overview of the Television Industry*, FCC Mass Media Bureau, Policy and Rules Division (March, 1992) at Attachment 6 [hereinafter cited as *Overview*].

[44]*The Veronis, Suhler & Associates Communications Industry Forecast* (Ninth ed., July, 1995) at 166 [hereinafter cited as "Veronis, Suhler"].

[45]NERA (Malrite) at 16.

With the market so defined, concentration in local advertising markets fails to rise to any level of concern. As the the EI Study analysis concludes

> [I]n a product market that includes video, radio, leading daily newspaper, yellow pages, outdoor, direct mail and miscellaneous local advertising, HHI's for "capacity" are typically substantially less than 700. They are only modestly higher when they are based solely on local advertising revenue. In the terminology of the *Merger Guidelines*, concentration in markets with HHI's below 1,000 is "low."[46]

In sum, local advertising markets are competitive and are expected to become more so as cable matures as an advertising medium and new entrants such as MMDS and open video systems enter the market.[47] The current state of local advertising markets, therefore, poses no barrier to relaxation of the duopoly rule.

2. Regardless of the breadth of the relevant market, common ownership of two stations in the same market would pose no threat to competition in the local advertising market.

No reasonably predictable scenario involving joint ownership of two stations in the same market suggests that competition in the local advertising market would be impaired. Even if the market is defined arbitrarily to exclude all but local broadcast and cable advertising, no material threat to competition could be predicted reasonably on the record before the Commission.

NERA, for example, using assumptions and variables which would overstate Hhi, prepared a number of simple illustrations based on DOJ *Merger Guidelines*. NERA found that "in each of the DMAs considered, some combination of affiliated

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[46] EI Study at 30-31.

[47] *See, e.g.*, INTV Comments at 13-14.

UHF stations would pass muster under the *Guidelines*, even based only on inflated market shares...."[48] NERA also found that

> The merger of two VHF stations, or two affiliates generally, would be unlikely to fall into a safe harbor based on the numbers presented here. However, if shares (and Hhi) are based, as they should be, on advertising revenues in an appropriately defined relevant market, many of these mergers would be likely to pass muster under the *Guidelines* screens.[49]

Thus, basic antitrust analysis indicates that common ownership of two stations in the same market typically would involve no material detriment to competition.

Furthermore, even where merger analysis under the *guidelines* might create cause for concern, no genuine basis exists for predicting that the combined stations could or would exercise market power. As emphasized by Economists,Inc., "[T]he fact an HHI exceeds 1800, even if the market were properly defined, does not necessarily imply that the exercise of market power is likely...."[50] First, looking only to the local market improperly excludes national advertising as a constraint on local advertising rate increases. The EI Study, observes:

> While it is usual to define separate national and local markets for advertising, there is both supply-side and demand-side substitution between these markets. This implies that national media have a role in constraining pricing in local advertising markets, and similarly that local media have a role in constraining prices in national advertising markets. This in turn implies that, other things equal, the potential for competitive problems in national and local advertising markets is

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[48]NERA (LSOC) at 19.

[49]NERA (LSOC) at 19.

[50]EI Study at 31.

> even less than is suggested by Hhi that are calculated on the assumption that national and local advertising markets are separate.[51]

Thus, reliance on Hhi in a narrowly-defined market excites a level of concern unwarranted by consideration of all the facts.[52]

Second, even in a theoretically concentrated market, anticompetitive conduct by the combined stations is unlikely.[53] The EI Study, asserts that

> Anticompetitive behavior is unlikely for two additional reasons. First, the exercise of market power in the relevant advertising markets would require collusion. It would be very difficult, not to mention unlawful, to reach, monitor, and enforce a collusive agreement. Second, in a properly defined product market, there would be scope for entry. As a result, even Hhi significantly over 1800 do not imply that exercise of market power is likely.[54]

NERA similarly concludes that

> The manner in which local spot rates are determined substantially reduces the likelihood of anticompetitive conduct. This would be true even if there were no disparity between VHF and UHF stations in the Cleveland DMA. Here, rates for any given local advertising spot are determined in vigorous bilateral negotiations between individual television stations and both existing and prospective advertisers. ...[T]he agreed upon rate will depend upon a number of factors, including the availability of alternatives *and* the relative bargaining power of the parties.

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[51]EI Study at 32-33.

[52]The EI Study notes, similarly, that substitutes near the border of a market (*e.g.*, direct mail and telemarketing) also undercut the implications of a given HHI in the local advertising market. EI Study at 34.

[53]As the Commission has recognized, concentration *per se* raises concerns about the *potential* for abuse of market power. *Further Notice* at ¶53.

[54]EI Study at 37.